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No. 78-1406

In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL AND HELENE C. MCCARTHY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 8a-9a) is unreported. The order of the district court is also unreported (Pet. App. 5a-6a).

JURISDICTION

The judgment of the court of appeals was filed on December 15, 1978 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on March 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether an order granting the United States possession of condemned land is appealable.

2. Whether the challenge to the validity of the order of possession is now moot because the United States has satisfied the final judgment of just compensation, and petitioners have vacated the property.

STATEMENT

On December 3, 1970, the United States filed a complaint in condemnation and a declaration of taking, pursuant to the Declaration of Taking Act, 40 U.S.C. 258a *et seq.*, covering 39.26 acres in Clermont County, Ohio, owned by petitioners Paul and Helene C. McCarthy. The land was needed in connection with the East Fork Reservoir project of the Army Corps of Engineers. That project was authorized by the Flood Control Act, 33 U.S.C. 701 *et seq.*, and was designed to provide flood control, water supply, water quality, and recreational benefits. On January 19, 1971, the district court entered judgment on the declaration of taking and granted the United States an order for possession of the property.

On September 19, 1971, on motion of the petitioners, the district court vacated the order of possession entered January 19, 1971. The district court reasoned that the Corps of Engineers had not been shown to have fully complied with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, in relation to the East Fork Reservoir project, and that possession by the United States was therefore inappropriate. The district court denied renewed motions for possession on January 24, 1972, and July 24, 1972.

On July 20, 1973, the State of Ohio filed suit challenging the East Fork Reservoir project on NEPA grounds and obtained a preliminary injunction against further construction of the project. *State of Ohio ex rel. Brown* v. *Callaway*, 364 F. Supp. 296 (S.D. Ohio 1973), aff'd and modified, 497 F. 2d 1235 (6th Cir. 1974). The petitioners, Paul and Helene McCarthy, were permitted to intervene in that action to pursue water quality issues under the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. 1251 *et seq.* A supplemental environmental impact statement was issued in 1974 by the Corps, and the State of Ohio dismissed its action on March 28, 1975.[1]

On June 14, 1976, an opinion and order of the district court in the condemnation action held that the Corps had demonstrated compliance with NEPA and included rulings concerning the date of taking and the propriety of an order of possession. On October 29, 1976, the district court certified the opinion and order for an interlocutory appeal pursuant to 28 U.S.C. 1292(b). The court of appeals, however, denied permission to appeal (6th Cir. No. 78-8221).

Meanwhile, on July 15, 1976, the district court entered an order granting the government possession of the property (Pet. App. 1a-2a). The petitioners, acting pro se, filed a "motion for injunctive relief" from the district court's order on July 22, 1976 (*id.* at 3a-4a). This motion attacked the order of possession on the ground that the Corps had not fully complied with NEPA and the FWPCA (*ibid.*). Construing the motion for injunctive relief as a motion to reconsider the possession order, the district court held a hearing and denied the motion (*id.* at 5a-6a). The petitioners filed a notice of appeal from the denial of the motion for injunctive relief.[2]

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[1]Petitioners and other intervenors in *State of Ohio ex rel. Brown* v. *Callaway* sought a new preliminary injunction to halt construction of the East Fork Reservoir project on September 12, 1975. The district court denied their motion on October 8, 1975, and the Sixth Circuit dismissed an appeal from this denial as moot on January 4, 1977 (No. 76-1129). On October 20, 1977, the district court granted summary judgment in favor of the Corps of Engineers. Civ. No. 8892 (S.D. Ohio). No appeal was taken from this judgment.

[2]The petitioners also filed, in the court of appeals, two motions for stay pending appeal; one before the notice of appeal was filed, No. 76-8158; and one after, No. 78-8185. Both were denied by the court of appeals.

The court of appeals denied the motion of the United States to dismiss the appeal for lack of appellate jurisdiction on January 6, 1977 (Pet. App. 7a). After full briefing and oral argument, however, the court of appeals issued an order dismissing the appeal on December 15, 1978 (*id.* at 8a-9a). The court reasoned that the appeal was governed by *Catlin* v. *United States,* 324 U.S. 229 (1945), which held that appeals in condemnation cases were to be had on the final judgment disposing of the whole case. The present petition for a writ of certiorari is from the order dismissing the petitioners' appeal.

While the appeal was pending in the Sixth Circuit, the petitioners vacated the property. Agreement was reached between the parties that $40,000 constituted just compensation for the taking, and, on December 12, 1977, a judgment on stipulation was entered in the district court (Addendum I). The United States paid the deficiency into the registry of the district court, and an order of final distribution was entered on October 16, 1978 (Stip. Addendum II). Proceedings on all the tracts comprised in *United States* v. *247.37 Acres in Clermont County, Ohio,* Civ. No. 7769 (S.D. Ohio), have been completed. There has been no appeal from the final disposition of this condemnation proceeding.

ARGUMENT

The petition should be denied because the case is moot and the decision of the court of appeals is correct.

1. This petition seeks to review a decision of the court of appeals that an interlocutory order of possession in a condemnation proceeding is not an appealable order. During the pendency of the appeal in the Sixth Circuit, however, final judgment was entered in the underlying condemnation action. No appeal has been taken from that final judgment. Title is now

indefeasibly vested in the United States, and the petitioners have been awarded just compensation. As there is no longer an active or live controversy between the parties, this Court could render only an advisory opinion on the issue of which review is sought. See *Hall* v. *Beals,* 396 U.S. 45, 48 (1969); *City of Los Angeles* v. *Davis,* No. 77-1553 (March 26, 1979), slip op. 5-6.

2. In *Catlin* v. *United States,* 324 U.S. 229 (1945), this Court held that a judgment on a declaration of taking under the Declaration of Taking Act, 40 U.S.C. 258a, and an order granting possession in a condemnation proceeding were not final judgments for the purposes of appellate jurisdiction. In particular, this Court ruled that challenges to the validity of the taking were not foreclosed by such orders, and that the landowners retained their rights to pursue such issues on an appeal from the final judgment. *Id.* at 243.

The Sixth Circuit correctly held *Catlin* to be dispositive of the appeal in this case. Petitioners resisted the order of possession on the ground that the taking was invalid for failure to comply with environmental statutes. The district court's adverse ruling on that issue was clearly a proper subject of an appeal from the final judgment in the condemnation action.

Petitioners have attempted to characterize their appeal as one from a denial of a preliminary injunction within the jurisdictional grant of 28 U.S.C. 1292(a). The motion for injunctive relief, however, was directed to the district court's previous order granting possession to the United States. The court correctly characterized the motion as one for reconsideration of the order of possession. As such, the denial of the motion is clearly unappealable under *Catlin.* See

United States v. *687.30 Acres of Land Etc., State of Neb. (Winnebago Tribe)*, 514 F. 2d 667, 670 (8th Cir. 1971).

The petitioners also suggest that the "death knell" doctrine, developed by several courts of appeals since *Catlin*, had undermined the validity of that decision. But the "death knell" doctrine has been rejected by this Court. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). As this Court noted in *Livesay*, 28 U.S.C. 1292(b) provides the appropriate procedure for interlocutory appeals of nonfinal orders. 437 U.S. at 474-475. See *2953.15 Acres of Land, More or Less, Russell County, Ala. (Bickerstaff)* v. *United States*, 350 F. 2d 356, 358 (5th Cir. 1965); *United States* v. *365.0 Acres of Land, Augusta County. Va. (Brady)*, 428 F. 2d 459 (4th Cir. 1970).[3] Petitioners did not invoke that procedure here, and their appeal was therefore properly dismissed.

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[3]Courts of appeals have also permitted interlocutory review in condemnation actions in instances where the policy against piecemeal appeals would not be compromised. In *United States* v. *Certain Land in the Borough of Manhattan (Foley Square)*, 332 F. 2d 679, 680 (2d Cir. 1964), the court took jurisdiction of an appeal from an order of possession raising only collateral issues which would not be presented on a final appeal. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). And in *Loughran* v. *United States*, 317 F. 2d 896 (D.C. Cir. 1963), the court permitted an interlocutory appeal where the validity of the taking could not be challenged on an appeal from a final order because the property was to be transferred to an international organization. In other cases, courts of appeals have found it appropriate to review, by way of mandamus, interlocutory orders in condemnation proceedings where the district court has exceeded its jurisdiction, *United States* v. *Cobb*, 328 F. 2d 115, 117 (9th Cir. 1964); *In re United States*, 257 F. 2d 844, 846 (5th Cir.), cert. denied, 358 U.S. 908 (1958), or where the district court had not followed appropriate procedures. *United States* v. *58.16 Acres of Land (Cooley)*, 478 F. 2d 1055, 1061 (7th Cir. 1973). None of these exceptional facts is involved in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*The Solicitor General is disqualified in this case.

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